These words appear to me to make it perfectly clear that the intention of the plaintiff was to authorise Subramaniam Chettiar to appoint a substitute with full powers to act on behalf of the plaintiff and not merely to appoint agents to act under Subramaniam Chettiar. If that be so, I do not think there can be any doubt that Subramaniam Chettiar had the power to appoint by way of power of attorney Periakaruppan as his substitute which he in fact did and that Periakaruppan Chettiar had the power to appoint by way of power of attorney a substitute which he in fact did in a third power of attorney in favour of one S. R. M. M. Kasi.

In these circumstances, I am of opinion that the appeal should be dismissed with costs. But I would add that in my opinion the plaintiff, having allowed Kasi to act for him for nearly two years after the Japanese occupation ceased, must be held to have ratified the acts of Kasi. The reasons given for allowing Kasi to continue to act for him during this period without intervention did not impress me. In my opinion it was only when the plaintiff wished to repudiate the acts of Kasi that he began to look around to find some argument on which to base the allegation that Kasi had not any authority to do what he had done on behalf of the plaintiff.

Appeal dismissed.

YONG NYAT YU & ANOR. v. LEE KEE.

[C. A. (Mathew, C.J., Sir Charles Murray-Aynsley, C.J. (S.) and Briggs, J.) December 20, 1952]

[K.L. — F.M. Civil Appeal No. 61 of 1952]

Landlord and tenant — Possession — Arrears of rent — Whether deposit as rent in advance affects arrears on due date.

This is an appeal from the decision of Wilson, J. reported in (1952) M.L.J. 231, dismissing an appeal from the Magistrate's Court. The respondent had paid 2 months rent in advance to be refunded at the end of the tenancy. The rent fell into arrears for 2 months and the appellant claimed possession on the ground that rent had been in arrears for more than 14 days. At this appeal it was argued that the deposit of 2 months rent in advance was not repayable until the end of the tenancy, and could not therefore be set off against the rent in arrears.

Held: the advance payment is rent, and rent is only due during the currency of a tenancy. The taking of a deposit repayable at the end of the tenancy is contrary to section 4(1) of the Control of Rent Ordinance, 1948. The advance of rent must be accounted for in assessing arrears of rent.

COURT OF APPEAL.

A. J. Bostock Hill for the appellants.

F. G. Charlesworth for the respondent.

Cur. Adv. Vult.

The judgment of the Court of Appeal was delivered by :—

Mathew, C.J. : —The respondent in this appeal is the tenant of certain premises owned by the appellants. When the appellants acquired the premises in January 1951, the respondent was already a tenant, and at the request of the appellants paid 2 months rent in advance, to be refunded at the end of the tenancy. The receipt for this amount read :—

"Received from Chop/Mr. Lee Kee for No. 92 A Tong Shin Lane of this town a deposit of two months, the said rent amounting to a total of $87.50 only. This is the proof.

Recipient (?) Signature.

Receipt issued this 16th day of February, 1951."

Thereafter the respondent paid his rent monthly with regularity, but fell into arrears for the months of May and June 1951.

On the 16th July 1951 the appellants informed the respondent through their Solicitors that he was more than 14 days in arrear with his rent, and gave notice to vacate the premises. The respondent did not vacate the premises, and on 11th October 1951 the appellants filed a claim in the Magistrate's Court claiming vacant possession and arrears of rent and mesne profits. The Magistrate held that the 2 months rent in advance should first be accounted for by the appellants and on that basis the rent for May and June was not in arrears. On appeal to the High Court the judgment of the trial magistrate was upheld.

Mr. Bostock Hill, for the appellants, argued before us that the deposit of 2 months rent in advance was not repayable until the end of the tenancy, and could not therefore be set off against rent in arrear. The relevant part of section 4(1) of the Control of Rent Ordinance, 1948 reads :—

"No person shall, as a condition of the grant, renewal, continuance, sale or assignment of a tenancy of any premises or as a condition for sub-leasing or sub-letting any premises require the payment of any premium or other like sum or the giving of any valuable consideration in addition to the rent, or receive such payment or consideration, and no person shall offer or make any such payment or offer to give such consideration:

Provided that it shall not be unlawful for a landlord to receive, and for a tenant to pay, in advance, rent not exceeding three months rent.

Provided further that a landlord may, with the permission of the Board, recover a reasonable sum in respect of dilapidations on the renewal of a lease."

The clear meaning of the proviso is that the landlord may receive rent in advance not exceeding three months rent.

The advance payment is rent, and rent is only due during the currency of a tenancy. The taking of a deposit equivalent to three months rent repayable at the end of the tenancy is, in our view, contrary to the express intention of the section. The trial magistrate was, therefore, correct in holding that the advance of rent must be accounted for in assessing arrears of rent, and in so holding he is supported by decisions which were not cited before us.

Appeal dismissed.

NG SEE HEM v. THE OFFICIAL ASSIGNEE FEDERATION OF MALAYA.

[P. C. (Lord Porter, Lord Normand and Lord Cohen) December 2, 1952]

[Privy Council Appeal No. 6 of 1951]

Appeal — Appeal on question of fact — Credibility of witnesses — Onus.

This was an appeal from the Supreme Court of the Federation of Malaya (reported under the heading Ng See Hem v. Lim Ah Hooi (1950) M.L.J. 280) to the Judicial Committee of the Privy Council.

The original plaintiff, now a bankrupt, alleged that he handed $60,000 to the appellant for safe custody and that the appellant and another signed the promissory note. The other admitted the debt and judgment was obtained against him. The appellant denied that he had ever executed the promissory note and pleaded that the promissory note was a forgery. He also denied that the original plaintiff had ever handed him the sum of $60,000. When the case came for trial the other signatory was present in Court but was not called as a witness for either side. Judgment was given against the appellant and he appealed to the Court of Appeal. The Court of appeal in dismissing the appeal held that the issue in this case was one of fact and as the learned trial Judge had based his decision on the opinion he formed as to the comparative reliability of the witnesses, the appellate Court could not interfere; and that although the plaintiff could have called the other signatory as his witness, his failure to do so could not rise any presumption under section 114 of the Evidence Ordinance, 1950, as the signatory had admitted his joint liability.

From this decision the appellant appealed to the Privy Council.

Their Lordships of the Privy Council agreeing with the decision of the Court of Appeal (Pretheroe, Ag. C.J., Thomson and Russell, JJ.) on the question of the interpretation of the judgment which the learned Judge delivered dismissed the appeal. On the question of onus the Board held that onus is an important matter when there is a doubt as to which side should be believed and no evidence, or no sufficient evidence, to establish the allegations of one side or the other has been given; but in this case the testimony given on behalf of each party has been fully heard, and the learned Judge had evidence before him on both sides and had to make up his mind upon it. Therefore no question of onus arises and the issue turns upon what is meant by the language used in the judgment and what can be gathered from it as to the approach which the learned Judge adopted towards the solution of the question before him. The learned trial Judge had approached the problem from the right angle.

The facts appear sufficiently from the judgments of the Court of Appeal and the Privy Council respectively.

PRIVY COUNCIL.

The judgment of their Lordships was delivered by :—

Lord Porter : — In this case the arguments for the allowance of the appeal have been put forward with vigour and with ability by Lord Hailsham in a matter which contains certain elements of difficulty. The defendant was defeated both in the court of first instance and in the Court of Appeal and their Lordships did at one stage in the argument suggest that there might have been concurrent findings of fact in the Malayan Courts which would be fatal to the success of the appeal. They are, however, not proposing to consider the matter from this angle nor to say that this is a case in which the concurrent findings rule comes into force. They have been persuaded that that should not be a ground of decision, particularly in a case in which it has not been fully argued. Therefore it remains to consider what view is to be taken of the judgment of the judge of first instance.

The action is an action brought by the Official Assignee of the estate of Mr. Lim Ah Hooi, who is now a bankrupt. Mr. Lim Ah Hooi was the original plaintiff, and his action was brought upon a promissory note dated in the year 1946 and bearing the date 27th October, and stamped on 28th October at Ipoh, which is some distance from the place where it is said that the note was made. If the note was a genuine note, apart from a question which one will have to consider, namely the point as to whether it is correctly stamped, the plaintiff must succeed; but in order to do so he must establish that the note is a genuine one; the *onus* is upon him to do so.

So far as the question of stamping is concerned, the note bears the appropriate stamps, but it is said that there is a regulation that the document must be either stamped when made or else it must be stamped within three days, and if stamped within three days it has to bear upon the document "stamped in due time"; and must be verified by the collector's signature or initials.

Again, their Lordships refrain from pronouncing upon what the exact procedure must be when a note is made because no point was taken upon it in the court below, and, indeed, in the case presented to their Lordships, it was not taken as establishing that the document was defective but merely as one of various cumulative grounds from which it was said it must be inferred that the note was not a genuine one.

The actual question as to what superscription the note must bear, whether it is sufficient that it is properly stamped or whether in addition to that there must be added "stamped in due time" with the initials or signature of the collector, must be left open to be argued in some case when it directly arises and when it has been taken in the court below. At the moment